

STATE OF MICHIGAN
COURT OF APPEALS

In re K. D. MCGEE, Minor.

UNPUBLISHED
October 13, 2016

No. 331536
Wayne Circuit Court
Family Division
LC No. 14-515931-NA

Before: SAAD, P.J., and JANSEN and M. J. KELLY, JJ.

PER CURIAM.

Respondent-mother appeals by right the trial court's order terminating her parental rights to the minor child under MCL 712A.19b(3)(c)(i), MCL 712A.19b(3)(c)(ii), MCL 712A.19b(3)(g), and MCL 712A.19b(3)(j).¹ Because we conclude that there were no errors warranting relief, we affirm.

I. BASIC FACTS

Respondent gave birth to the child in August 2009. Respondent was not married to the child's father, but he established paternity by executing an affidavit of parentage.

In February 2014, the Department of Health and Human Services investigated respondent and father after receiving a complaint that they were not properly supervising the child and were abusing drugs. An investigator spoke with the child's adult half-sister, Mia McGee, and learned that she had been caring for the child since January 2014. She told the investigator that her father dropped the child off because respondent was abusing heroin and was hospitalized as a result of a needle being stuck in her vein. Mia McGee also told the investigator that neither respondent nor her father had provided any support for the child and neither had contacted the child during this period. She said her father contacted her and asked her to return the child to his care in late February 2014; her father and respondent were squatting in an abandoned home at the time.

¹ Although the trial court also terminated respondent-father's parental rights, he has not appealed. Therefore, we shall use respondent to refer solely to the child's mother.

On March 3, 2014, police officers went to the home where respondent and father were squatting and saw drug paraphernalia throughout the home—including needles strewn about—as well as children’s toys. An officer stated that respondent and father were heating the home with a four-burner stove. Father returned the child to Mia McGee’s care on March 5, 2014. Two days later the Department petitioned to remove the child from the care of respondent and the child’s father. A referee held a hearing on the same day as the petition and determined that the child should be removed. The Department placed the child with the child’s maternal aunt, Clarise Lee.

A referee held pretrial hearings in April and May 2014. Respondent participated in the April hearing by speakerphone because she was incarcerated in the Oakland County Jail. The child’s father did not show for either hearing because he was apparently evading arrest.

In June 2014, respondent waived her right to an adjudication trial before a jury agreed that she had been “living a relative transient lifestyle” prior to her arrest and, for that reason did not have “suitable housing” for her child. She also admitted that she had a year-long addiction to heroin. On the basis of respondent’s admissions, the trial court found that there were grounds to assert jurisdiction over respondent’s parental rights to the child.

Over the course of several months, the Department provided respondent with various services and required her to take random drug tests, obtain a legal source of income, and find suitable housing, among other things. Although respondent completed some services, she missed many drug screens, tested positive for drugs—including cocaine, did not document her employment history, and did not find suitable housing. After she was again arrested for shoplifting, the Department filed an amended petition and the trial court held a termination hearing in January and February 2016.

After the close of proofs at the termination hearing, the trial court summarized the main points of contention and respondent’s argument that she had made progress and deserved more time. The court opined that respondent’s sudden recognition that she has a problem with drugs was “not of great value” in the case. Rather, her sudden conversion seemed to have more to do with the realization that her failure to recognize the problem might cause a jurist to question whether she could ever solve that problem.

The court similarly did not put much faith in the power of attorney that respondent presented at trial and which was purportedly made to authorize her sister to care for the child. The court noted that the document was apparently executed on the same day that someone referred the child to the Department. The court felt that the document did not affect the services or treatment plan and appeared to be an after the fact justification. The court similarly rejected respondent’s purported justification for her shoplifting. The court stated that her excuse was belied by the fact that she claimed to be working and was told that the Department would provide her with a security deposit and her first month’s rent. Finally, the court flatly rejected the argument that respondent had complied with her treatment plan as “fantasy.” The court found that the Department had established by clear and convincing evidence grounds to terminate respondent’s parental rights.

The trial court then turned to the child's best interests. It recognized that the child was placed with a relative who would be willing to provide for him while the court gave respondent more time. But it felt that it had no way of knowing whether respondent would benefit from more time:

I also heard that for almost two years she has been completely unable to provide for him. She's been unable to support him. The question is what more time might give us in this situation, and as pointed out I have no way of knowing exactly when [respondent] might be actually back in the community to start working to prove that she can provide for [the child.]

The court stated that it had to decide between "maintaining a level of uncertainty where we don't know where [the child] is going to be living a year from now or two years from now" and providing stability. The child already referred to Lee as "mama" and the power of attorney had limited value. Because these were "critical years in the development of a young child," the court was not "persuaded that another three months or six months or nine months is going to give [it] a different set of facts to work with here." Accordingly, it found that termination was in the child's best interests.

On February 3, 2016, the trial court entered an order terminating respondent's parental rights to the child under MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j).

This appeal followed.

II. STATEMENT OF GROUNDS FOR TERMINATION AND INDIAN HERITAGE

A. STANDARDS OF REVIEW

Respondent first argues that the trial court erred when it failed to "enumerate the grounds" for terminating her parental rights and instead improperly relied on its determination that termination would be in the child's best interests. She also argues that the trial court failed to inquire from her whether the child or the child's parents were members of an Indian tribe. As a result, she maintains, the "record is void and therefore has a serious defect in the proceedings."

This Court reviews de novo whether the trial court properly interpreted and applied the relevant statutes and court rules. *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012). Respondent did not preserve these claims of error by raising them before the trial court. See *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). This Court reviews unpreserved claims of error involving the termination of parental rights for plain error affecting substantial rights. *Id.* A plain error affecting substantial rights is an error that was clear or obvious and affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

B. STATUTORY GROUNDS

The Department had the burden to establish by clear and convincing evidence at least one ground for terminating respondent's parental rights. *In re Gonzales/Martinez Minors*, 310 Mich App 426, 431; 871 NW2d 868 (2015). Only if the Department met that burden would the trial

court then have to find whether termination was in the child's best interests. MCL 712A.19b(5). The trial court could not enter an order terminating respondent's parental rights unless it first made "findings of fact, state[d] its conclusions of law, and include[d] a statutory basis for the order." MCR 3.977(I)(3). The trial court could state "on the record or in writing its findings of fact and conclusions of law." MCR 3.977(I)(1). "Brief, definite, and pertinent findings and conclusions on contested matters are sufficient." MCR 3.977(I)(1).

After the close of proofs at the termination hearing, the trial court summarized respondent's position and suggested that she did not contest that there was evidence to establish one or more grounds for termination:

[I]t sounds as though the primary argument made on behalf of the mother is that not so much that the Department has failed in their efforts to establish by clear and convincing evidence that there are grounds to terminate her rights but really that there should be more time given or that it's not in the best interests to terminate the rights of the mother.

The court appreciated that respondent's mother and sister felt that respondent might still improve if given more time. Nevertheless, the court declined to give her further time to comply with the plan. It rejected the claim that respondent failed to improve because her family did not offer her enough support and that, if given more time, her family would not let her fail again. The court described how the record evidence showed that respondent had not benefited from her plan, but instead offered "justifications" for her use of "substances illegally" which prevented her "from being the parent of that child." It similarly rejected respondent's justification for again engaging in theft. The court even characterized respondent's trial lawyer's argument that respondent had complied with her plan as "fantasy." It then found that the Department had proved "grounds to terminate the mother's rights." Although it did not specifically identify those grounds at the termination hearing, the trial court stated in its attachment to the order terminating respondent's parental rights that it found that the Department had established by clear and convincing evidence grounds to terminate respondent's parental rights under MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j).

The trial court's findings at the termination hearing, when read in conjunction with the court's order, were sufficient to meet the requirements of MCR 3.977(I). The trial court did not plainly err in its recitation of its findings and the grounds for termination.

C. INQUIRY INTO INDIAN HERITAGE

At the time of the preliminary hearing, the Department's investigator was unable to locate the child's parents and they did not appear at the hearing. The referee did inquire as to whether the child had American Indian heritage and the Department's worker testified that she inquired about the child's heritage from the father's family and they denied that he had any Native American heritage. The respondent's family, by contrast, was unsure whether they had Indian heritage. The worker agreed, however, that no one that she spoke to claimed that the child or parents had Native American heritage.

Contrary to respondent's assertion on appeal, the trial court did not have to question her directly as to whether she or the child was a member of an Indian tribe. The trial court had only to inquire *generally* about the child and parents' membership in a tribe. MCR 3.965(B)(2). Because there was no evidence that the child or his parents were members of a tribe, the trial court did not have to take any further steps at the preliminary hearing. MCR 3.965(B)(2). Moreover, respondent did not argue before the trial court and has not argued before this Court that she or the child were members of an Indian tribe. In the absence of evidence that the child or his parents were in fact members of a tribe, respondent cannot establish that the trial court's failure to more fully explore the child's heritage amounted to plain error that prejudiced her substantial rights. *In re Utrera*, 281 Mich App at 8.

III. ORDER OF TERMINATION

A. STANDARDS OF REVIEW

Respondent finally argues that the trial court clearly erred when it found that the Department proved a statutory ground for terminating her parental rights and clearly erred when it found that termination was in the child's best interests. This Court reviews for clear error a trial court's factual findings following a termination hearing. *In re Gonzales/Martinez Minors*, 310 Mich App at 430. A finding is clearly erroneous if, after reviewing all the record evidence, the reviewing court is left with the definite and firm conviction that a mistake has been made. *Id.*

B. GROUNDS FOR TERMINATION

The trial court found that the Department had proved by clear and convincing evidence grounds to terminate respondent's parental rights under MCL 712A.19b(3)(c)(i), (c)(ii), (g), and (j). Because the trial court did not specifically address its findings for each statutory ground, it is unclear what "[o]ther conditions" the trial court found existed "that cause[d] the child to come within the court's jurisdiction," and which remained unrectified even after the Department's intervention. See MCL 712A.19b(3)(c)(ii). Nevertheless, even assuming that the trial court clearly erred when it found that the Department had proved this ground by clear and convincing evidence, it did not clearly err when it found that the Department had proved the other grounds.

A trial court may terminate a parent's parental rights if after "182 or more days have elapsed since the issuance of an initial dispositional order" and the "conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age." MCL 712A.19b(3)(c)(i). The conditions that led to the child's removal were respondent's transient lifestyle, her illegal use of drugs, and her criminal conduct.

The evidence showed that respondent was living with her boyfriend—the child's father—in an abandoned home with poor living conditions when the child came to the Department's attention. In the more than 20 months following this period, the Department tried to help respondent obtain a stable and proper home. Respondent was, however, unwilling to take the steps to rectify her transient lifestyle. Respondent lived with her mother when she was not housed in jail or a mandatory substance abuse program. Despite living with her mother, there was evidence that she had intermittently been staying with a friend at a hotel. Respondent

admitted that her friend abused cocaine—indeed she claimed that her positive test for cocaine might have been caused by exposure to cocaine at this residence—and yet she earlier told a caseworker that she relied on her friend for support because she had gone through many of the same experiences. There was also evidence that the Department’s caseworkers had repeatedly offered to pay the security deposit and first month’s rent on a home for respondent, but respondent failed to take advantage of the offer. Respondent also apparently worked three different jobs at various points, but was unable to save enough money to obtain housing. Indeed, she testified that she again turned to shoplifting in order to secure money for housing. This evidence supported a finding that respondent was unable or unwilling to rectify her housing problem and would likely return to a transient lifestyle if left to her own devices.

There was also evidence that respondent continued to use drugs illegally. She repeatedly missed drug tests and—when she did submit to a test—she tested positive. Respondent claimed that she only tested positive for drugs that she could legally take to control the pain from her pancreatitis, but she did not provide any medical documentation establishing that she had a valid and continuing prescription for pain medications and did not document the need for chronic pain management, despite having been ordered to do so. She presented two bottles for pain medications and some discharge papers that showed she had been given a prescription for morphine and Dialudid that would last for about five days; yet she failed to state how those few pills led to positive test results over a period of weeks. Moreover, given that there was no evidence from a treating physician that established respondent’s need for long term pain management, the trial court could infer from these events that respondent used the emergency room visit to obtain prescription narcotics, which she would not otherwise have been able to obtain.

Respondent further showed no insight into her problems. She even went so far as to deny that she had any drug problem at all despite having previously admitted to abusing heroin. She also tested positive for cocaine and admitted that she was spending time with a woman who abused cocaine and thought of that friend as a good support person. Although she claimed that she turned to shoplifting to raise money for a home, as the trial court stated at the close of the termination hearing, that excuse was directly contradicted by the evidence that the Department’s workers had offered to pay respondent’s security deposit and first month of rent. For that reason, the trial court rejected respondent’s testimony as implausible: “So that attempt to explain away this theft incident in September is just without any rational basis from the eyes of the Court.” The court related that it must “judge individuals based not on what they tell us in the courtroom but what they do when they’re not in the courtroom.” From the totality of this evidence, the trial court could reasonably find that respondent continued to use narcotics illegally and continued to engage in criminal conduct to support her habit.

The record evidence likewise supported a finding that respondent would be unable to rectify the conditions within a reasonable time. When this case first began, respondent was in jail for shoplifting. She received a short sentence followed by participation in a mandatory drug treatment program. The Department then provided her with services after her release: it provided her with individual and family therapy, gave her bus tickets, tried to help her find housing, and provided her with parenting classes. The Department also required her to obtain employment and cease misusing drugs. It also asked her to take drug tests to ensure compliance and asked her to provide documentation for her work and medical needs.

Despite taking advantage of some services, respondent nevertheless demonstrated that she had not benefited from the services provided to her over more than 20 months. She refused to provide medical documentation and only belatedly provided documents for her intermittent work history. She did not find housing and, when she complied with the drug testing regimen, she tested positive. Finally, even with these services, respondent ended up in jail for the same crime that she admittedly resorted to in the past whenever she needed money. Respondent's inability to admit that she had a drug problem, her failure to take steps to find housing, her resort to shoplifting to raise cash, and her testimony that she found support from a woman that she knew abused cocaine strongly suggested that—even with additional services—she would be unable to provide proper care and custody to the child within a reasonable time.

The trial court did not clearly err when it found that the Department had proved by clear and convincing evidence grounds to terminate respondent's parental rights under MCL 712A.19b(3)(c)(i). This same evidence also supported the trial court's findings that the Department proved by clear and convincing evidence grounds to terminate respondent's rights under MCL 712A.19b(3)(g) and (j).

A trial court may terminate a parent's parental rights under MCL 712A.19b(3)(g) if it finds that the "parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age." It may terminate the parent's parental rights under MCL 712A.19b(3)(j) if it finds that there "is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent."

The evidence established that respondent was not providing the child with proper care and custody at the time that the Department intervened. As discussed already, the Department provided respondent with services intended to help her rectify the conditions that prevented her from providing proper care and custody. Despite these efforts, the evidence showed that respondent continued her illegal drug use, continued to rely on others for housing, and continued to resort to criminal conduct. That is, there was clear evidence that respondent still was not in a position to care for the child and would not be in such a position for the foreseeable future. The evidence that respondent continued to use drugs illegally and would likely return to a transient lifestyle also supported an inference that she posed a danger to the child if he were returned to her care. MCL 712A.19b(3)(j).

Respondent nevertheless argues that she did provide—and continues to provide—proper care and custody for the child because she arranged to have her sister provide proper care and custody for the child while she worked through her problems. For this reason, she contends, the Department could continue to provide her services without any danger to the child and with those services she might be in a position to provide proper care and custody to the child at some point in the future.

Respondent in part relies on three published cases for the proposition that a trial court cannot terminate a parent's parental rights when the parent has made adequate provision for the care and custody of a child through placement with a relative: *In re Maria S. Weldon*, 397 Mich 225, 296; 244 NW2d 827 (1976) (opinion by LEVIN, K.), overruled in part by *Bowie v Arder*, 441

Mich 23, 47; 490 NW2d 568 (1992), *In re Curry*, 113 Mich App 821; 318 NW2d 567 (1982), and *In re Carlene Ward*, 104 Mich App 354; 304 NW 2d 844 (1981). Although the courts in each of these decisions recognized that a parent can arrange for his or her child to have proper care and custody through a relative placement, each case specifically addressed whether the trial courts could take jurisdiction over a child where the child was not being neglected because the child had been placed in a relative's home and was receiving proper care and custody. In this case, there was evidence that the child was being neglected prior to the Department's intervention and respondent pleaded to the relevant allegations in the original petition. As such, the trial court lawfully took jurisdiction over the child and could consider whether there were grounds for terminating respondent's parental rights, notwithstanding the evidence that respondent took steps to place the child with her sister shortly after the Department's intervention.

The fact that a child has been placed with a relative who is providing proper care and custody is, however, an important factor to consider when determining whether a parent has provided for the care and custody of his or her children. See *In re Mason*, 486 Mich 142; 782 NW2d 747 (2010). Indeed, a child's placement with a relative weighs against termination and the trial court must explicitly address this factor when making its best interests determination. *In re Olive/Metts Minors*, 297 Mich App 35, 43-44; 823 NW2d 144 (2012). A trial court may nevertheless terminate a parent's parental rights to a child, notwithstanding the availability of a suitable placement with a relative, if it finds that termination is in the child's best interests. *In re McIntyre*, 192 Mich App 47, 52-53; 480 NW2d 293 (1991).

The trial court agreed that the child was doing well under his aunt's care, but found that respondent would not be in a position to provide proper care and custody for the child within a reasonable time even if provided with more services. On this record, it cannot be said that the trial court's finding was clearly erroneous. The Department's obligation to provide services does not include an obligation to provide endless services. See, e.g., *In re JL*, 483 Mich 300, 326-327; 770 NW2d 853 (2009) (stating that, even in cases subject to the Indian Child Welfare Act, the Department does not have an obligation to provide endless services, and recognizing that there comes a time in every case when the Department may justifiably pursue termination without providing additional services). Thus, the fact that the child would not be endangered during any additional period of services was not dispositive;² instead, the matter was a question of whether termination was in the child's best interests. *In re Olive/Metts Minors*, 297 Mich App at 43-44.

Respondent also maintains that the trial court clearly erred to the extent that it found that the Department provided her with suitable services. More specifically, she notes that the Department failed to provide her with services while she was incarcerated and argues that this failure warrants reversal. The time for asserting the need for additional or different services is

² Respondent is further mistaken when she argues that MCL 712A.19b(3)(j) did not apply because there was no likelihood that the child would be harmed because he was under his aunt's care and would not be returned to respondent's care. MCL 712A.19b(3)(j) specifically requires the court to find whether the child would be harmed *if* returned to respondent's care.

when the trial court adopts a service plan. *In re Frey*, 297 Mich App 242, 247; 824 NW2d 569 (2012). Respondent did not ask for additional services from the Department prior to the termination hearing and did not challenge the adequacy of the services before the trial court. She has also not identified on appeal any additional services that might have helped her solve the problems that prevented her from being a parent to her child.

Although the Department did not provide respondent with services when she was in jail or mandatory drug treatment, it does not necessarily follow that the Department's efforts were unreasonable. The Department's ability to provide services to incarcerated parents is quite limited and whether the lack of services was reasonable depends on the incarcerated parent's individual circumstances:

The Department has no control over an imprisoned parent's conditions of incarceration, his or her access to services, his or her placement in a particular facility, or a host of other factors that implicate the Department's ability to intervene. As such, the reasonableness of the Department's efforts must be evaluated in light of the circumstances involving the incarcerated parent. [*In re Jondall*, unpublished opinion per curiam of the Court of Appeals, issued May 5, 2016 (Docket No. 328934); slip op at 8.]³

In this case, respondent's stays in jail were relatively short and her enrollment in a drug treatment program directly served one of the Department's goals. She also participated fully in the hearings that occurred when she was incarcerated. Cf. *In re Mason*, 486 Mich at 153-155. Additionally, after her release and before her subsequent incarceration, the Department provided respondent with the services already noted. These services were reasonably directed at rectifying the barriers to reunification and, with respondent's full commitment to the plan, could have prevented the termination of respondent's parental rights. On this record, it cannot be said that the trial court clearly erred when it found that the Department made reasonable efforts to preserve and reunify respondent with her child. See *In re Fried*, 266 Mich App 535, 542-543; 702 NW2d 192 (2005).

The trial court did not clearly err when it found that the Department proved by clear and convincing evidence grounds to terminate respondent's parental rights under MCL 712A.19b(3)(c)(i), (g), and (j). The Department only had to prove one ground for termination. Therefore, even if the trial court clearly erred when it found that the Department proved the ground stated under MCL 712A.19b(3)(c)(ii), that error would not warrant relief. *In re Olive/Metts Minors*, 297 Mich App at 41.

³ Unpublished opinions are not binding authority. MCR 7.215(C)(1). However, the Court in *In re Jondall* clarified the law applicable to the Department's duty to provide services to an incarcerated parent after our Supreme Court's decision in *In re Mason* and we find it persuasive.

C. BEST INTERESTS

“Even if the trial court finds that the Department has established a ground for termination by clear and convincing evidence, it cannot terminate the parent’s parental rights unless it also finds by a preponderance of the evidence that termination is in the best interests of the children.” *In re Gonzales/Martinez Minors*, 310 Mich App at 434, citing MCL 712A.19b(5) and *In re Moss*, 301 Mich App 76, 90; 836 NW2d 182 (2013). In considering the child’s best interests, the trial court should consider the “child’s bond to the parent, the parent’s parenting ability, the child’s need for permanency, stability, and finality, and the advantages of a foster home over the parent’s home.” *Id.* (quotation marks and citation omitted). And, as already noted, the trial court must consider a child’s placement with relatives and such a placement weighs against termination. *In re Olive/Metts Minors*, 297 Mich App at 43-44.

There was evidence that respondent had a strong bond with the child and acted appropriately with him during visits. In addition, the child was doing well under his aunt’s care and she testified that she would continue to care for the child as long as needed. There was also evidence from which a reasonable fact-finder could conclude that respondent had support from other family members. However, there was also strong evidence that respondent was unwilling or unable to stop abusing drugs, could not maintain consistent employment, and would return to a transient lifestyle in the absence of court supervision or supervision by a parole officer. Respondent’s failure to provide even basic documentation to establish her work history and medical needs, her lack of insight into her drug problem, and her failure to avail herself of the Department’s offer to help her pay for housing—even when faced with the loss of her parental rights—is evidence that respondent is incapable of placing her child’s need for a stable life before her personal desires. And one could reasonably infer that respondent’s continued involvement with the child as a parent under these circumstances might disrupt the child’s placement with his aunt.

Indeed, there was evidence to support an inference that respondent might interfere with her sister’s efforts to parent the child to the child’s detriment if the court did not terminate respondent’s parental rights. The child was not quite five years old when the Department intervened and placed him with his aunt. The child had a severe speech delay and the Department’s caseworker related that he functioned more like a two-year-old child. On the basis of these delays, the school prepared an Individualized Education Program (IEP) for him that included special services to help with his speech delay. At the June 2015 hearing, the trial court learned that the child’s caregiver—his aunt—wanted to proceed with the IEP, but respondent opposed her sister’s efforts. In the end, the trial court had to resolve the dispute by ordering that the child receive the services.

The child needs stability and consistency from a caregiver who places his needs over her own needs and the evidence shows that respondent cannot provide that stability and consistency. Instead, she continues to be a source of instability in the child’s life. Under these circumstances, the trial court did not clearly err when it found that termination of respondent’s parental rights was in the child’s best interests. MCL 712A.19b(5).

IV. CONCLUSION

The trial court properly stated the grounds for termination and did not plainly err when it did not inquire more fully about whether the child or his parent's had Indian heritage. The trial court also did not clearly err when it found that the Department had proved one or more grounds for terminating respondent's parental rights and did not clearly err when it found that termination was in the child's best interests.

Affirmed.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Michael J. Kelly